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Notices

DEPARTMENT OF JUSTICE (DOJ)
Civil Division

[CIV Docket No. 109]

Civil Division; Radiation Exposure Compensation Act: Allowance for Costs and Expenses; Combination of Work Histories

73 FR 63196

DATE: Thursday, October 23, 2008

ACTION: Notice.

SUMMARY: The Department of Justice ("the Department") is publishing this Notice to inform the public of two matters related to the adjudication of claims filed under the Radiation Exposure Compensation Act ("RECA" or "the Act"). First, in light of the Tenth Circuit Court decision in *Hackwell v. United States, 491 F.3d 1229 (10th Cir. 2007),* the Department will no longer enforce its regulation concerning attorney's fees whereby attorneys are prohibited from receiving reimbursement for expenses and costs above the statutory fee limits specified in the Act. The Notice further explains that the Department will not limit attorneys from receiving reimbursement for such expenses and costs from their clients, even when a claim is unsuccessful. Finally, the Department intends to initiate a rulemaking to strike the existing regulation at § 79.74(b) and revise the language, consistent with the Court's decision and this policy statement.

Second, the Department has an ongoing policy of combining uranium industry work histories, consistent with the plain language of the Act. By statute, to be eligible for compensation as a result of exposure to radiation due to employment in the uranium production industry, a claimant must demonstrate that he or she was, for at least one year, employed in a uranium mine, employed in a uranium mill, or employed in the transportation of uranium ore or vanadium-uranium ore. This Notice articulates the Department's policy that, assuming all other eligibility criteria are satisfied, claimants may satisfy this one-year statutory requirement by combining different periods of employment in uranium mining, uranium milling, and ore transporting.

DATES: This notice is effective on October 23, 2008.

FOR FURTHER INFORMATION CONTACT: Gerard W. Fischer (Assistant Director), 202-616-4090 or Dianne S. Spellberg (Senior Counsel), 202-616-4129, Constitutional and Specialized Tort Litigation Section, Torts Branch, Civil Division.

SUPPLEMENTARY INFORMATION: On October 5, 1990, Congress passed the Radiation Exposure Compensation Act. *See also* Claims Under the Radiation Exposure Compensation Act, 28 CFR 79 (2006). The Act offers an apology and monetary compensation to individuals (or their survivors) who have contracted certain cancers and other serious diseases following exposure to radiation released during above-ground atmospheric nuclear weapons tests or following their employment in the uranium production industry during specified periods. On July 10, 2000, the RECA Amendments of 2000 were enacted, providing expanded coverage to individuals who developed one of the compensable diseases in the Act, adding two new claimant categories (uranium millers and ore transporters), and lowering the amount of attorney's fees from 10% of the lump sum compensation award to 2% of the award in connection with the filing of an initial claim.

This unique program was designed as an alternative to litigation in that the statutory criteria do not require claimants to establish causation. Rather, if the claimant can satisfy the requirements outlined in the statute, which include demonstrating that he or she contracted a compensable disease after working or residing in a designated location for a specific period of time, he or she qualifies for compensation. Congress charged the Attorney General with responsibility for adjudicating claims under the Act. The Attorney General delegated this function to the Constitutional and Specialized Tort Litigation Section of the Torts Branch of the Civil Division of the United States Department of Justice.

I. Attorney's Fees and Costs

On July 10, 2000, Congress amended RECA by lowering the permissible fee limitation for attorneys from 10% to 2% of the compensation award, in [*63197] connection with the filing of an initial claim. Pursuant to the law, claimants who were previously denied compensation may re-file their claim up to three times. In cases where a claim has been re-filed, Congress directed that attorneys may receive 10% of the compensation award. Specifically, section 9 of RECA, titled "Attorney Fees," provides:

(a) General Rule. Notwithstanding any contract, the representative of an individual may not receive, for *services rendered* in connection with the claim of an individual under this Act, more than that percentage specified in subsection (b) of a payment made under this Act on such claim.

(b) Applicable Percentage Limitations. The percentage referred to in subsection (a) is--

(1) 2 percent for the filing of an initial claim; and

(2) 10 percent with respect to--

(A) any claim with respect to which a representative has made a contract for services before the date of the enactment of the Radiation Exposure Compensation Act Amendments of 2000; or

(B) a resubmission of a denied claim.

(c) Penalty. Any such representative who violates this section shall be fined not more than $ 5,000.

Source: 42 U.S.C. 2210 note (2006), Sec. 9 (emphasis added).

In its implementation of the amendments, the Department determined that costs and expenses, which primarily involved obtaining medical tests and purchasing and transmitting copies of documents required for RECA claims, were included within the meaning of "services rendered in connection with the claim of an individual under this Act." Accordingly, the Department promulgated regulations consistent with this interpretation of the statutory language.

On March 23, 2004, the Department published a final rulemaking to implement the "2000 Amendments." *See* 28 CFR 79 (2006). The regulation at § 79.74(b) states:

(b) Fees.

(1) Notwithstanding any contract, the attorney of a claimant or beneficiary, along with any assistants or experts retained by the attorney on behalf of the claimant or beneficiary, may not receive from a claimant or beneficiary any fee for services rendered, *including costs incurred, in connection with an unsuccessful claim.*

(2) Notwithstanding any contract and except as provided in paragraph (b)(3) of this section, the attorney of a claimant or beneficiary, along with any assistants or experts retained by the attorney on behalf of the claimant or beneficiary, may receive from a claimant or beneficiary no more than 2% of the total award for all services rendered, *including costs incurred, in connection with a successful claim.*

(3)(i) If an attorney entered into a contract with the claimant or beneficiary for services before July 10, 2000, with respect to a particular claim, then that attorney may receive up to 10% of the total award for services rendered, *including costs incurred, in connection with a successful claim.*

(ii) If an attorney resubmits a previously denied claim, then that attorney may receive up to 10% of the total award to the claimant or beneficiary for services rendered, *including costs incurred, in connection with that subsequently* *successful claim.* Resubmission of a previously denied claim includes only those claims that were previously denied and refiled under the Act.

(4) Any violation of paragraph (b) of this section shall result in a fine of not more than $ 5,000.

Id. (emphasis added).

The Department, in adopting a regulation that included costs and expenses within the interpretation of the fee limitation for attorneys, sought to comply with the congressional intent in amending RECA as a whole.

The Hackwell Litigation

On April 21, 2004, the plaintiff alleged that her co-plaintiff, a law firm, had refused to represent her because of the Department's regulation, 28 CFR 79.74(b), that limits attorney compensation for representation of claimants seeking to file a claim under RECA. The plaintiffs challenged the regulation as contrary to the RECA statute, an invalid preemption of state law, and a violation of the Fifth and Tenth Amendments. The district court dismissed the suit for failure to state a claim, holding that the regulation was a "reasonable interpretation" of the statute and that the Department "did not exceed its statutory authority in implementing Congress's compensation limitation." *Hackwell, et al* v. *United States, et al.*, Civil Action No. 04-cv-00827-EWN (D. Colo. Sept. 28, 2005).

On appeal, the Tenth Circuit held that the plain meaning of "services rendered" revealed Congress's unambiguous intent to exclude "costs incurred" from the attorney fee limitation and invalidated 28 CFR 79.74(b) as "contrary to the RECA's plain language." *Hackwell, 491 F.3d at 1241.* The case was remanded to the district court for further proceedings. On remand, plaintiffs sought an injunction against enforcement of the regulation, which defendants opposed. In its July 23, 2008 remand decision, the district court granted the injunction and directed that attorneys may recover expenses and costs from their clients even in regard to claims under the Act that are unsuccessful.

Statement of Policy

In light of the decision in *Hackwell*, the Department will not enforce its regulatory provision, 28 CFR 79.74(b), prohibiting attorneys from receiving reimbursement for expenses and costs from their clients in connection with claims filed under the Radiation Exposure Compensation Act, in addition to the statutory attorney's fee. Moreover, attorneys may collect expenses and costs regardless of whether a claim is approved or denied. Finally, the Department intends to initiate a rulemaking to strike the existing regulation at 28 CFR 79.74(b) and revise the language, consistent with the Court's decision in *Hackwell* and this policy statement.

II. Combination of Employment for Uranium Worker Claimants

The Department has been requested to publish its longstanding policy regarding the combination of different types of employment--mining, milling, and ore transporting--to satisfy the Act's statutory one-year duration of employment requirement.

The Act provides compensation to individuals exposed to radiation released during above-ground atmospheric nuclear weapons tests or to individuals exposed to radiation as a result of their employment in the uranium production industry. With respect to individuals employed in the uranium production industry, the Act specifically provides compensation for: (1) Individuals either exposed to 40 or more working level months of radiation while employed in a uranium mine or employed for at least one year in a uranium mine ("miners"); (2) individuals employed for at least one year in a uranium mill ("millers"); or (3) individuals employed for at least one year in the transport of uranium ore or vanadium-uranium ore from such a mine or mill ("ore transporters").

To be eligible for compensation under the Act as a miner, miller, or ore transporter, the claimant must have been employed in that position at any time during the period January 1, 1942 to December 31, 1971. Additionally, the claimant must have been employed as a miner, miller, or ore transporter in Colorado, New Mexico, Arizona, [*63198] Wyoming, South Dakota, Washington, Utah, Idaho, North Dakota, Oregon, or Texas. Finally, all three categories of uranium workers must have been diagnosed with a compensable disease. For all three categories of uranium workers (miners, millers, and ore transporters), the Act specifies the following six compensable diseases: Primary cancer of the lung, fibrosis of the lung, pulmonary fibrosis, cor pulmonale related to fibrosis of the lung, silicosis, and pneumoconiosis. In addition to those compensable diseases applicable to all three categories of uranium workers, the Act specifies the following two additional compensable diseases for claimants who were employed as millers and ore transporters (but not as miners): Primary renal cancer and chronic renal disease including nephritis and kidney tubal tissue injury.

Statement of Policy

The issue has been raised whether claimants can combine periods of employment as a miner, miller, and ore transporter. In order to be eligible for compensation, the Act requires claimants to have been employed for one year as a miner, miller, or ore transporter. In some instances, a claimant may have worked in separate positions as a miner, miller, or ore transporter for less than one year, but the claimant's total, cumulative period of employment in these positions exceeds one year. The question is whether the Act's eligibility criteria may be satisfied by such a combination of periods of employment.

The Department is publishing this Notice to articulate its policy that claimants can combine periods of employment as miners, millers, and ore transporters to meet the one-year requirement. For all three categories of uranium workers (mining, milling, and ore transporting), the Act specifies six common diseases: Primary cancer of the lung, fibrosis of the lung, pulmonary fibrosis, cor pulmonale related to fibrosis of the lung, silicosis, and pneumoconiosis. Therefore, in cases involving those six illnesses, the Act's exposure criteria can be satisfied by combining periods of employment that include mining, milling, and ore transporting. For millers and ore transporters (but not miners), the Act specifies two additional compensable diseases: Primary renal cancer and chronic renal disease including nephritis and kidney tubal tissue injury. In cases involving those two illnesses, the Act's exposure criteria can be satisfied by combining periods of employment that include only milling and ore transporting.

This Notice is intended to inform the public of the Department's longstanding policy regarding the calculation of the referenced employment periods. In addition, the Department will continue to announce this policy at outreach events and in communications with claimants, counsel, and support groups.

Dated: October 14, 2008.

Gregory G. Katsas,

Assistant Attorney General, Civil Division.

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